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COURT REVIEW OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION¹

When the Hepburn Rate Bill, amending the Act to Regulate Commerce, was under discussion in the Senate of the United States, during the spring of 1906, the storm center of debate was around the jurisdiction of the courts over the orders of the Commission. After several months of discussion a compromise was reached by the adoption of the following language:

The venue of suits brought in any of the Circuit Courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission, shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers, then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia, then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts.

One party had favored a "broad review," the other a "limited review." Both claimed the victory. This subject is now before the Supreme Court of the United States for decision. It is one of great practical importance; indeed, in the opinion of many, upon its determination depends the efficiency of the present act as a measure of rate regulation.

¹ This article was prepared before the decisions of the Supreme Court in *Wilcox v. Consolidated Gas Co.* of New York, and *City of Knoxville v. Knoxville Water Co.*, had been announced, January 4, 1909. Those cases fully support the conclusions reached.—ED.

The Act to Regulate Commerce provided, before the amendment of 1906, as it does now, that interstate rates shall be reasonable. Under the old law, if the Commission found, after investigation, that a rate was unreasonable, it was authorized to order the carrier to cease and desist from the charging of that rate, and in pursuance of this authority, the Commission made orders requiring carriers not to charge for the future in excess of a rate named by it.

In the Maximum Rate case, *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway Co.*,² which was a suit brought to enforce such an order of the Commission, the Supreme Court of the United States held that the Commission had no authority to fix a rate for the future. It said that this was a legislative function, which could only be conferred upon a commission by express language; that the Act to Regulate Commerce contained no such apt language, and that the possession of such a vast power as the fixing of the interstate railway rates of the United States could not be implied.

It was earnestly insisted that there could be no effective control of railway charges except by the exercise of that authority which had been denied to the Commission by this decision, and an agitation at once sprang up for the necessary amendment to the statute, which bore fruit in the legislation of 1906. While the Hepburn amendment contained many other provisions of great importance, the cardinal purpose of that enactment was to invest the Commission with this power to establish a rate for the future. This was the vital thing demanded by the friends of railway regulation. This was the provision against which the railroads most strenuously protested. That such authority is clearly conferred by the present Act appears from the following language of the fifteenth section:

That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in Section 13 of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the

² 167 U. S., 479.

provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged.

In the Maximum Rate case, the Court, at page 499, said :

It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act.

And, again, on page 501 :

The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative.

This is a clear statement that the fixing of a rate for the future is a legislative function. That the Court is still of the same opinion appears from its recent utterance in the Virginia Passenger Rate case, *Prentis et al. v. Atlantic Coast Line Co. et al.*,³ not yet reported.

The State of Virginia by constitutional amendment, created a Corporation Commission endowed with executive, legislative and judicial duties. This Commission was authorized, among other things, to establish rates for the transportation of property and passengers by rail and to enforce those rates by the same kind of process which courts employ in the enforcement of their judgments. The statutes of the United States provide that a Federal Court shall not interfere with the operations of a State Court, and the manifest purpose was to prevent the interference of the Federal judiciary with the rates which this corporation commission established within the State of Virginia.

This Commission did establish rates for the transportation of passengers. The railroads affected by these rates, claiming that they were so low as to be confiscatory, brought suit in the Circuit Court of the United States against the individuals composing the Corporation Commission both as individuals and as a commission. The defendants demurred, claiming that they were a court; that their acts were those of a court, and therefore not subject to control by the Circuit Court of the United States. The Supreme Court decided :

That the State of Virginia might, if it saw fit, combine, as it had done, executive, legislative and judicial functions in one body, but that the character of the act was not determined by the name of the tribunal which discharged it. It held that the making of a rate for the future was legislative; that this Corporation Commission in establishing such a rate was discharging a legis-

³ Decided November 30, 1908.

lative function, and that the Federal Courts had jurisdiction over the defendants both as individuals and as a body, to the extent that they were performing this function, although, with respect to many of their other functions, they were in fact a court.

The Interstate Commerce Commission is, therefore, so far as it fixes the rate for the future, performing a legislative act.

The wide difference between the function of the Commission under the present Act and its function under the original statute must be clearly apprehended. Before the last amendment it was entirely an administrative or *quasi-judicial* body. It was required to find certain facts and to draw its conclusions from those facts. Its facts and conclusions were by the terms of the Act itself made subject to the approval of the Courts. As was said by one Circuit Court, speaking through a judge afterwards a member of the Supreme Bench, the Commission was in essence a master in chancery to the Court, and while the Court would give to its findings and conclusions the respect due to those of an expert body, they were still always subject to review by the Court itself. The domain of the Commission and the domain of the Courts were the same.

To-day, in the fixing of a future rate this is entirely otherwise. The Commission acts not in the present but in the future. It is not an arm of the Court, but of the legislature. Its orders are to be respected not because those who make them are experts; nor because the orders themselves are wise, but because they are the orders of that body which has been duly appointed by law to determine the fact embodied in the order. The Commission to-day is a coordinate branch of the government of the United States, whose acts, within the limits of its jurisdiction, are entitled to be respected as such.

To what extent and for what reason may Courts set aside the legislative orders which the Commission now makes? In my opinion only to the extent and for the reason that they violate the statutes or the Constitution of the United States. They cannot be attacked upon the ground that they are unwise or even unjust, for the judgment of the Commission itself determines what is wise and just.

Congress might establish these rates by direct enactment. Had it done so the statute could only be declared void by the Courts if clearly unconstitutional. There is no pretense that the legislative discretion or policy could be reviewed and corrected. When a legislative order of the Commission is attacked, this further ques-

tion arises: Has the Commission acted within the jurisdiction conferred upon it by the statute?

Clearly the Courts may inquire whether the Commission has proceeded according to law in the making of the order. Is it upon proper complaint, have the necessary notices been given, the proper hearings had? Is the order in the form prescribed by the statute, and is it of that kind which can be made under the statute? All these questions are for the Court; for they all go to the jurisdiction.

There is probably this further question: Is the order of the Commission so clearly wrong as to be beyond the power of the Commission to make? It is conceivable that the rate established by it might be so palpably unjust that a Court would feel called upon to say that Congress could never have intended to invest that body with authority to make such an order.

There is a degree of similarity between the legislative functions discharged by railroad commissions in the establishment of railroad rates and those of various municipal bodies and boards in the exercise of their duties. Municipalities, for example, are given authority to make certain ordinances; often to grant franchises, and in doing so they exercise a legislative discretion. Ordinarily, courts will not set aside these ordinances for any error of discretion; but they do sometimes interfere upon the ground that the act of the municipality is so utterly unreasonable as to be beyond the evident intent of the legislature to authorize. No Federal authority clearly in point is available, but the following language is quoted from a recent case—*Le Feber v. West Allis* ⁴—as a fair statement of the rule:

The honest judgment of the municipal authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of Courts. Nevertheless the delegation of legislative power to subordinate political divisions of the State is solely for public purposes, and must be exercised with reference to them. If an act be so remote from every such purpose that no relation thereto can, within human reason, be discovered, such act must be deemed excluded from the delegation. To that extent, then, Courts will inquire into the purpose and policy of municipal conduct, and will hold unauthorized, and invalid, acts which are wholly unreasonable.

Authority is frequently conferred upon the executive departments of the United States to determine certain questions of fact, and the uniform holding of the Supreme Court has been that the

⁴ 119 Wis., 608.

correctness of decisions made under such authority upon matters of fact are conclusive upon the Courts.

The Secretary of the Interior decided that patents should not be issued to certain individuals upon certain lands, for the reason that the lands were not of the kind which could be taken under such patents. Held, that the action of the Secretary could not be reviewed by judicial proceedings.

Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the Courts have no power whatever under those circumstances to review his determination by mandamus or injunction. *Riverside Oil Co. v. Hitchcock*.⁵

Congress had enacted that no teas should be admitted into the United States unless they equaled certain standards established by the Secretary of the Treasury. The Secretary was authorized to fix these standards and to determine whether teas offered for import tested up to the standards fixed. Held, that the action of the department in rejecting teas under this statute was conclusive. *Buttfield v. Stranahan*.⁶

The Chinese Exclusion Act provides that certain classes of Chinamen shall not be admitted into the United States. When a Chinaman offers himself for admission he is examined by the immigration authorities and his application is passed upon by them. From their decision an appeal lies to the Secretary of Commerce and Labor, whose decision is made final. A person born of Chinese parents while they are residing in the United States is a citizen of the United States. Ju Toy presented himself for admission into the United States, asserting that he was an American citizen. The immigration authorities after inquiry found that he was not and ordered him deported, and upon appeal this order was confirmed by the Secretary.

Thereupon he applied to the Circuit Court for a writ of *habeas corpus*. That Court entertained the petition and referred the matter to a master, by whom it was found that Ju Toy was in fact a citizen of the United States. The Court confirmed the report and ordered the petitioner discharged from custody.

The Supreme Court of the United States held that the decision of the Department was final and conclusive, and that the Circuit

⁵ 190 U. S., 316, 324.

⁶ 192 U. S., 470.

Court had no jurisdiction to entertain the petition. *United States v. Ju Toy*.⁷

If the Secretary of War determines that a bridge over one of the navigable streams of the United States is by reason of its construction an impediment to navigation, he may order such changes as are necessary to remove the obstruction, and these changes the owner is required to make under severe penalty. The Secretary of War in pursuance of this authority, notified the Union Bridge Co. to make certain changes in its bridge across the Allegheny River at Pittsburg, Pa. A compliance with the order would have required an entire reconstruction of the bridge, and the Bridge Company declined to comply, claiming that the effect of the order was to appropriate its property without due process of law. It was held that the Courts could not interfere. *Union Bridge Co. v. United States*.⁸

These cases all proceed upon the theory that where Congress has properly conferred upon a particular department or branch of the government the duty of determining a given fact, the correctness of the decision of the appointed person, if honestly acting within the limits of his authority, cannot be reviewed by the Courts. The making of a rate for transportation by rail for the future is a governmental function, properly discharged by the legislature. The Interstate Commerce Commission has been designated by Congress as the agency to fix for the future these rates in execution of its declared policy that such rates shall be reasonable, just as the Secretary of War has been chosen to execute its declared policy that the navigable streams shall be free from obstruction. Its order cannot be attacked upon the ground that the Commission has erred in judgment. The Court cannot substitute itself for the Commission and set aside the order because, upon the same evidence or upon new evidence, it would have reached a different conclusion. It must appear that the order is opposed to the statutes or the Constitution. Such an order may be annulled as in contravention of the statute if not authorized by the statute, or if the prescribed formalities have not been followed, or if it is so palpably wrong as to be plainly without the jurisdiction of the Commission to make. Upon what ground can it be set aside as obnoxious to the Constitution?

The fifth amendment to the Constitution of the United States

⁷ 198 U. S. 253.

⁸ 204 U. S., 364.

provides that private property shall not be taken for the public use unless by due process of law and upon just compensation. The railways assert that when a particular rate is imposed upon them by law that is a taking *pro tanto* of their property; that this taking is against the Constitution, unless due compensation is made and that the Courts may inquire whether the rate allows a fair return upon the property which has thus been devoted to the public use.

Certainly, the Courts may always inquire whether an act of the legislature or an order of the Commission violates the Constitution. It must also be conceded that a change in its rates intimately affects the property of a railway. The railway is constructed for the sole purpose of making and collecting charges for transportation, and whatever touches those charges goes to the value of the property. But does it follow that the making of a rate is the taking of property or that the Court, if convinced that the carrier is not receiving a suitable return under the rate allowed, may for that reason set it aside as obnoxious to the fifth amendment?

The reasonableness of railway rates is not of necessity determined by the return which they yield. This will appear from a familiar illustration. Here is a railroad connecting two cities, between which it handles the entire traffic. Under a given schedule of rates its earnings are ample. Two additional railroads are constructed by two other companies between the same points. The rates remain the same, but the business is divided into three equal parts, and no one of these railroads can pay its operating expenses. Does it follow that the schedule of rates is unreasonable, and should an order continuing that schedule be set aside as unconstitutional?

Although no such rule may have ever been stated by the Courts, it is certainly consonant with the dictates of justice that every railroad company which has embarked its property in the public service should be entitled to make a reasonable charge for the service which it renders the public. Conversely, there is an implied understanding that this railroad shall not impose upon the public charges which are in excess of what is reasonable. The fixing of a rate by the legislature or by a commission, is not a taking of the property of the company without due process of law, for that is the proper way and the only way under the laws of this land by which the rate can be established. The owners

themselves have voluntarily devoted it to the public use. So long, therefore, as a railroad is permitted to charge a reasonable rate for its service its property has not been "taken" under the Constitution. The public, by imposing reasonable rates and regulations, simply compels a specific performance of the implied contract that such charges shall be reasonable.

Nor, so long as the rate is reasonable, is there any taking of property without just compensation. It may be that the owners of this property are receiving no return whatever upon their investment; it may be that their return is exceedingly lucrative. This may depend upon the judgment with which the enterprise has been planned and is executed. There is no taking in violation of the Constitution until something other than a reasonable rate is imposed. If that matter be considered for a day, and then for a year, in all its kaleidoscopic aspects, it will still come back to this, that the individuals who have devoted their property to the public service by the construction and operation of a railway have a constitutional right to charge a reasonable rate and to make whatever they can under that rate.

Who, then, determines what is a reasonable rate? Clearly, the legislature. That is precisely what the legislature does when it fixes the rate. Courts cannot inquire whether the judgment of the legislature was right or wrong. Within the limits of just legislative action that rate is conclusive upon the Courts.

Consider the case, *Munn v. Illinois*,⁹ the pioneer of all these cases. The question presented was an extremely simple one: Can the State of Illinois determine the price per bushel which shall be charged by a public elevator for elevating and storing grain? Munn objected that it could not; that although his elevator had been devoted to the public service, still it was for the Court and not for the legislature to determine the reasonableness of his charges. Waite, Chief Justice, stated the issue in these words:

"It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question."

This question the Court answered in favor of the legislature. It was held that the State might determine the price at which Mr. Munn should render this service for the public. Could he under that decision have applied to the Court to say whether the

⁹ 94 U. S., 113.

rate fixed by the legislature allowed him a *fair* return upon his property? His property might be so situated that he was entitled to make no return whatever upon it. He was entitled to a reasonable rate and to make what he could upon his property under that rate.

It is objected that under this rule a person may be deprived of his property and that the Court should secure him in the right to the enjoyment of his property. If Ju Toy was a citizen of the United States, then the Court should have protected him in his rights as such citizen, but the finding of the Department of Commerce and Labor conclusively established that he was not such a citizen. If the bridge of the Union Bridge Company was not an obstruction to navigation, then that company should have been protected against the loss of its bridge; but the finding of the Secretary of War settled that question. So the decision of the legislature that a particular rate is reasonable is conclusive and must be respected so far as the discretion of the legislature is exercised within constitutional limits.

But, it is urged, experience has shown that acts of legislatures and orders of commissions fixing rates are frequently unjust and oppressive. What protection has the railway investor against abuse of this kind?

The Supreme Court in *Stone v. Farmers Loan & Trust Co.*,¹⁰ when pressed with the possible consequences of its holding in the *Munn* case and the subsequent *Granger* cases, said at page 331:

This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation.

It is for the Court to finally determine in every instance whether the statute or the order is regulation or confiscation. If in a particular case an entire schedule of rates does not yield to the railroads of a given section as a whole an adequate return, that is most persuasive evidence that such schedule exceeds the limits of just regulation, and is, therefore, an attack upon the just rights of property.

This does not, however, seem to be exactly the ground upon which Courts have proceeded in the past or are likely to proceed in the future in dealing with the acts of legislatures and the orders of commissions establishing rates. It should be noted that practically the same question is presented in the case of the State Legislature or the State Commission, under the 14th amendment,

¹⁰ 116 U. S. 307.

which is presented with reference to the Federal Legislature or Commission under the 5th amendment.

The establishment of a reasonable railway rate involves a wide range of discretion or judgment. The rate on cotton piece goods from New York to San Francisco, was, December, 1908, \$1.00 per 100 pounds. The rate on the same commodity to Denver, Colorado, was \$1.80 per 100 pounds. The transportation from New York to San Francisco may be, and frequently is, through Denver. While the distance from New York to Denver is somewhat greater than from Denver to San Francisco, the conditions of transportation beyond Denver are so much more difficult, that the cost of the service up to Denver certainly does not exceed that beyond. We have, therefore, a rate one and eight-tenths times as great for one-half the service.

In *Western Classification*, cotton piece goods are rated as first class; in *Official Classification*, as 15 per cent less than second class; in *Southern Classification*, from first class down, according to the nature of the article and the manner in which presented for shipment.

It will be seen therefore, that the rates voluntarily established by the carriers upon this commodity vary with the conditions under which they are established, and that their reasonableness can be brought to the test of no standard. It is all a matter of judgment. And this is true in varying degrees of all railway rates. The cost of the service is sometimes a controlling factor and sometimes of very little significance.

Now, the Supreme Court seems to be of the opinion that the discretion of the legislature or commission in fixing these railway rates is supreme, with one single limitation: The property which these corporations have dedicated to the public service must be protected; upon the fair value of that property they are entitled to a fair return, and whenever legislature or commission establishes a schedule of rates which does not, on the whole, yield a fair return upon a fair value of the property used, that act or order is obnoxious to the Federal Constitution as a taking of property without due process of law and without just compensation.

This rule is a perfectly just one and altogether simple in its statement; the difficulty lies in the application. What is a "fair" value of the property invested or a "fair" return upon the

property? The more these questions are discussed the more hazy becomes the atmosphere surrounding them.

What is a fair return would seem to be preeminently a question for the legislature. When the commission establishes a given rate, the crucial point determined by it in many cases is: Does that rate yield to the carrier a just return upon the value of its property? The rate fixed expresses the judgment of the Commission upon that point. When the Court sets that order aside as unconstitutional, it of necessity determines that the judgment of the Commission was wrong and that its own judgment is right.

This being so, it would appear that the statute or the order ought not to be set aside unless the Court finds not only that it is unfair in this respect, but that it is so palpably unfair that there can be no two opinions upon that point among reasonable men. So long as there can be two opinions that of the legislature should govern, for the legislature is the body appointed by the Constitution to determine this question.

And such would seem to be in substance the holding of the Supreme Court. The last cases involving anything like a schedule of rates upon which the Court has been asked to express an opinion were those from California, involving schedules of water rates. Under the Constitution and statutes of that State, various municipal boards are required to fix rates at which water companies shall furnish water for irrigating purposes. A certain water company conceived that the rates established for its operations were so low as to be in violation of the 14th amendment, and brought that question before the Supreme Court. In disposing of the matter the Court said, that the same considerations must govern which obtained in passing upon the reasonableness of a schedule of rates fixed by a legislature or railway commission for transportation by rail. In *San Diego Land & Town Co. v. National City*,¹¹ the following language is used at page 753:

It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable, as between the public and those who appropriated water and supplied it for general use. . . . But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just, both to the owner and to the public; that is, judicial interference should

¹¹ 174 U. S., 739.

never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

In *San Diego Land & Town Co. v. Jasper*,¹² this occurs at page 441:

In a case like this, we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fairminded board to come to the result which was reached. And again on page 446:

We do not sit as a general appellate board of revision for all rates and taxes in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed, together with such collateral questions as may be incidental to our jurisdiction over that one.

State legislatures have in many cases made it the duty of Courts to review the orders of railway commissions, and decisions can be found which hold that this authority is properly delegated. It is at least doubtful whether Congress could impress the Courts into its service in determining the reasonableness of railway rates to be charged for the future; but however that may be, no such attempt has been made. The railways against whom these orders are made often, and indeed usually, extend through several judicial districts, and a single order may apply to numbers of railroads. It might, therefore, be extremely difficult to determine in what jurisdictions an action should be brought to set aside an order of the Commission, and each railroad affected by the order might have the right to bring suit in its own name and jurisdiction. For the purpose of avoiding these complications the venue of such suits was fixed, and the Circuit Court first obtaining jurisdiction was vested with authority to hear and determine the entire matter. Otherwise the Court was left free to exercise whatever jurisdiction it had under the statutes and Constitution of the United States.

That Congress did not intend to invest the Courts with authority to review the discretion of the Commission, appears from the fact that from a decision against the complainant no appeal whatever lies. It is only when the decision is in favor of the complainant and an order is made that proceedings to attack this order can be taken. Had it been the purpose to give the

¹² 189 U. S., 439.

Courts jurisdiction to correct erroneous conclusions of the Commission, both parties would have been accorded the right of appeal.

My belief therefore is, that the Supreme Court will finally hold:

1. That an order of the Interstate Commerce Commission establishing a railway rate for the future is legislative, and that the Commission in making such an order is a part of the legislative branch of this government.

2. That such orders of the Commission are conclusive unless they contravene either the statutes or the Constitution of the United States.

3. That if the Commission has proceeded in the manner and within the limits prescribed by the statute, its order will not be interfered with by the Courts unless so plainly wrong as to transcend the bounds of legitimate regulation, or as to amount to a taking of property without just compensation or due process of law.

For the first year and a half following the enactment of the Hepburn amendment, orders of the Commission were generally complied with; for the last six months nearly all its orders of any importance have been resisted by judicial proceedings and are now in process of litigation. The railroads claim that the Courts must put themselves in the place of the Commission, must hear testimony, and must finally substitute their judgment for that of the Commission. If such is the law, it must of course be so interpreted and applied; nor will the Courts shrink from that duty because it is difficult; but none the less, such an interpretation would be most unfortunate.

This government must finally effectively regulate its railways. This cannot be done through the Courts. England tried that method for twenty years and failed. The United States tried it for nineteen years, and the people rose *en masse* in protest against that system. If the contention of the railroads prevails no substantial progress will have been made in this respect. Such a declaration from the Court could only lead to a renewal of this agitation, which would not stop until the Constitution itself had been so altered as to enable the people to deal properly with these public servants.

Charles A. Prouty.